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CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
Petitioner,

vs.

DAKOTA LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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(32,817)

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I.

The application should be denied because the petition for the writ of certiorari was not filed within the three months period prescribed by statute.

Prior to the amendment of the Judicial Code by the Act of February 13th, 1925, the holdings of this Court were to the effect that the three months period was tolled by petition for rehearing in the Circuit Court of Appeals.

Citizens Bank of Michigan City, Indiana, v. Opperman, 249 U. S. 448, 39 Sup. Ct. Rep. 330, 63 L. ed. 701.

Andrews v. Ry., 248 U. S. 272, 39 Sup. Ct. Rep. 101, 63 L. ed. 236.

Chicago Great Western R. R. v. Basham, 249 U. S. 164, 39 Sup. Ct. Rep. 213, 63 L. ed. 534.

These decisions are all based on the ground that certiorari, writ of error or appeal would not lie except in the case of final judgment, and that the judgment was not final until denial or other disposition of the petition for rehearing was had.

By the Act of February 13th, 1925, there is no provision made that the judgment or decree must be final. In fact, Chapter 9, Judicial Code, Title 28, Section 347, Amending Section 240 of the Code provides (subdivision a) that:

> "It shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari *either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court* * * *."

Furthermore, prior to the amendment of February 13th, 1925, there was no provision in the statutes for the extension of the three months period. The Act now provides, Section 350, Chapter 9, Title 28, Judicial Code, that:

> "For good cause shown the time for applying for a writ of certiorari may be extended not to exceed sixty days by a justice of the Supreme Court."

Judgment in this case was entered in the Circuit Court of Appeals April 12th, 1927 (pages 198-199, Record). Petition for rehearing was filed May 19th, 1927, or approximately five weeks thereafter, (pages 199-206, Record), and the order denying the petition was made May

26th, 1927 (Page 206, Record). The petition for certiorari was not filed herein until the 4th day of August, 1927, or more than three months after the entry of the judgment.

If because of the Amendment of February 13th, 1925, to the Judicial Code, it be no longer necessary that the judgment be final in order to apply for a writ of certiorari, then the three months period cannot be enlarged by the petition for rehearing. The sole method of enlarging the time would be by procuring an order from a justice of the Supreme Court extending the time not to exceed sixty days. The record shows no such order.

If to procure a writ of certiorari it is still necessary that the judgment be final, the application should be dismissed because the judgment is not final, for the judgment directs that the "cause be, and the same is hereby, remanded to the said District Court with directions for proceedings not inconsistent with the opinion of this Court." (Page 199, Record). The opinion (pages 193-198) shows that a new trial is contemplated. Such a judgment is not final.

LeCrone v. McAdoo, 253 U. S. 217, 40 Sup. Ct. Rep. 510, 64 L. ed. 869.

Chicago, etc. Ry. Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. Rep. 281, 36 L. ed. 1002.

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II.

Petitioner's First Point.

The first point made by petitioner on page 6 of its brief is evidently regarded as being pertinent to the first reason advanced by it for certiorari, viz: that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

The point upon which the Circuit Court of Appeals decided the cause was that the contract to a certain extent was a wagering policy. The respondent's answer to amended complaint (pages 39a-39i of the Record) was sufficient to tender this defense.

Error was assigned on the court's order in striking this defense (Pages 179-180, ff. 225-226, Record).

This stricken pleading together with the offer made in court were entirely sufficient, if permitted, to establish the defense.

A fair reading of the opinion of the Circuit Court of Appeals (pages 193-198, Record) shows that the Court considered this assignment of error and that the expression "tender of proof" as used in the Court's opinion does not merit the narrow construction placed thereon by petitioner.

Certiorari is not granted to review evidence and discuss specific facts.

United States v. Johnston, 268 U. S. 220, 45 Sup. Ct. Rep. 496, 69 L. ed. 925.

III.

Petitioner's Second and Third Points.

Petitioner's discussion of these two points fails to demonstrate that the Circuit Court has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

In its opinion the Circuit Court of Appeals cites the authorities of this and other courts which amply support its decision. These authorities are cited in subdivision 4 of the opinion at page 197 of the Record.

It is in subdivision 4 of the opinion that the Court determines that the policy to a certain extent was void because it was a wagering contract and the incontestable clause did not bar that defense.

In its petition for rehearing in the Circuit Court of Appeals (page 205, Record), petitioner states:

> "*We do not here question the soundness of the legal principles enunciated by the Court in subdivision numbered 4 of its decision, but submit that these principles have no application on this writ of error.*"

Nothing has occurred since this to impair the "soundness of the legal principles enunciated by the Court."

Respectfully submitted.

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